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# **Civil Justice Committee Meeting**

**February 8, 2006  
10:30 AM  
214 Capitol**

**Allan G. Bense  
Speaker**

**Mark Mahon  
Chair**

# Committee Meeting Notice

## HOUSE OF REPRESENTATIVES

Speaker Allan G. Bense

### Civil Justice Committee

**Start Date and Time:** Wednesday, February 08, 2006 10:30 am

**End Date and Time:** Wednesday, February 08, 2006 11:45 am

**Location:** 214 Capitol

**Duration:** 1.25 hrs

#### Consideration of the following bill(s):

HB 37 CS Security of Consumer Report Information by Adams

HB 519 Internet Screening in Public Libraries by Kravitz

NOTICE FINALIZED on 01/27/2006 12:38 by Hay.Tracey



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 37 CS                      Security of Consumer Report Information  
**SPONSOR(S):** Adams and others  
**TIED BILLS:** None                      **IDEN./SIM. BILLS:** SB 656

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Economic Development, Trade &amp; Banking Committee</u>	<u>13 Y, 0 N, w/CS</u>	<u>Sheheane</u>	<u>Carlson</u>
2) <u>Agriculture Committee</u>	<u>10 Y, 0 N, w/CS</u>	<u>Reese</u>	<u>Reese</u>
3) <u>Civil Justice Committee</u>	<u></u>	<u>Shaddock</u>	<u>Bond</u>
4) <u>Commerce Council</u>	<u></u>	<u></u>	<u></u>
5) <u></u>	<u></u>	<u></u>	<u></u>

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### SUMMARY ANALYSIS

The bill defines the term "security freeze" and allows a consumer to place such a freeze on his or her consumer report. A security freeze prohibits a consumer reporting agency from releasing the consumer's report or any information contained within the report without consent of the consumer. A security freeze remains in place until the consumer requests that it be removed or temporarily lifted.

The bill permits a consumer reporting agency to charge a reasonable fee, not to exceed \$10, to a consumer who elects to place, remove, or temporarily lift a security freeze on his or her consumer report. However, a consumer reporting agency is prohibited from charging any fee to a victim of identity theft seeking a security freeze.

The bill creates a new cause of action for a person who is aggrieved by a violation of the provisions of the bill.

This bill does not appear to have a fiscal impact on state or local governments.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Safeguard Individual Liberty -- The bill allows a consumer to protect his or her personal information by placing a security freeze on his or her consumer report and to remove or temporarily lift the security freeze at his or her discretion.

#### B. EFFECT OF PROPOSED CHANGES:

##### Current Situation

There is currently no Florida legislation that provides for a security freeze or block on consumer information. There are however, twelve states that offer varying forms of credit freezes.<sup>1</sup> Additionally, the Fair Credit Reporting Act<sup>2</sup> (FCRA) enacted by Congress provides two types of fraud alerts that consumers may use to protect themselves against identity theft.<sup>3</sup>

##### Effect of the Bill

The bill permits a consumer to place a security freeze ("freeze") on his or her consumer report by making a request in writing by certified mail to a consumer reporting agency ("agency").<sup>4</sup> The freeze prohibits the consumer reporting agency from releasing the consumer's report or any information contained within the report without the authorized consent of the consumer.<sup>5</sup> The freeze remains active until the consumer requests it be thawed.<sup>6</sup> The bill does not prohibit a consumer reporting agency from informing a third party that a particular consumer report has been placed under a freeze.<sup>7</sup>

Once a consumer requests a freeze, the agency must place a freeze on a consumer's report no later than five business days after receiving the written request.<sup>8</sup> When the freeze has been initiated, the agency must send the consumer a written confirmation of the freeze within five business days.<sup>9</sup> In that written confirmation, the agency must provide the consumer with a personal identification number or password to be used by the consumer should the consumer wish to provide a limited release of his or her credit report for a designated period of time during the freeze.<sup>10</sup>

If the consumer wishes to allow access to the report for a designated period of time while a freeze is in effect, the consumer must contact the agency and request the freeze be temporarily lifted. In addition, the consumer must provide: proper identification as determined by the consumer reporting agency; the personal identification number or password provided by the agency; and information regarding the specified period of time during which the report will be temporarily available.<sup>11</sup>

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<sup>1</sup> California, Colorado, Connecticut, Illinois, Louisiana, Maine, New Jersey, Nevada, North Carolina, Texas, Vermont, and Washington offer consumers the right to freeze their credit reports. Illinois, Texas, Vermont, and Washington only offer the option of a credit freeze to those consumers affected by identity theft.

<sup>2</sup> 15 U.S.C. ss. 1681 et seq.

<sup>3</sup> There are four bills currently filed in the United States Senate and three bills filed in the House of Representatives relating to the protection of consumer information.

<sup>4</sup> Section 501.005(2).

<sup>5</sup> Section 501.005(1).

<sup>6</sup> Section 501.005(11).

<sup>7</sup> Section 501.005(1).

<sup>8</sup> Section 501.005(3).

<sup>9</sup> Section 501.005(4).

<sup>10</sup> *Id.*

<sup>11</sup> Section 501.005(5).

Once an agency has received a request for the complete removal of a freeze from the consumer, the agency must remove the freeze within three business days.<sup>12</sup> The same timeframe is applicable for a consumer's request for a temporary lift of a freeze.<sup>13</sup> To process requests by consumers for temporary access to the frozen report, an agency must develop either a telephone system or other form of secure electronic media to process consumer requests.<sup>14</sup>

An agency may temporarily lift or remove a freeze only upon the consumer's request<sup>15</sup> or if the consumer report was frozen due to a material misrepresentation of the fact by the consumer.<sup>16</sup> Should the freeze be lifted based upon a material misrepresentation, the agency must notify the consumer in writing before removing the freeze.<sup>17</sup> A third party who requests access to a consumer report may treat the application as incomplete if the consumer has not authorized a temporary lifting of the freeze for the period of time in which the request is made.<sup>18</sup>

### Exemptions

The bill provides the following exemptions for use of a credit report by certain entities regardless of a freeze being placed on a consumer's report:

- Any person to whom the consumer owes a financial obligation under certain circumstances;<sup>19</sup>
- A subsidiary, affiliate, agent, assignee of a person to whom access has been granted for purposes of facilitating the extension of credit or other permissible use;<sup>20</sup>
- Any state agency acting within its lawful investigative or regulatory authority;<sup>21</sup>
- A state or local law enforcement agency acting to investigate a crime or conducting a criminal background check;<sup>22</sup>
- Any person administering a credit file monitoring subscription service to which the consumer has subscribed;<sup>23</sup>
- Any person for the purpose of providing a consumer with a copy of the consumer's report upon the consumer's request;<sup>24</sup>
- Pursuant to a court order lawfully entered;<sup>25</sup> or
- The use of credit information for the purposes of prescreening as provided for by the FCRA.<sup>26</sup>

In addition, check services companies and demand deposit account information services companies are not required to place a freeze on a consumer's report.<sup>27</sup> Fraud prevention services companies

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<sup>12</sup> Section 501.005(11).

<sup>13</sup> Section 501.005(6).

<sup>14</sup> Section 501.005(7).

<sup>15</sup> Section 501.005(8)(a).

<sup>16</sup> Section 501.005(8)(b).

<sup>17</sup> *Id.*

<sup>18</sup> Section 501.005(9).

<sup>19</sup> Section 501.005(12)(a).

<sup>20</sup> Section 501.005(12)(b).

<sup>21</sup> Section 501.005(12)(c).

<sup>22</sup> Section 501.005(12)(d).

<sup>23</sup> Section 501.005(12)(e).

<sup>24</sup> Section 501.005(12)(f).

<sup>25</sup> Section 501.005(12)(g).

<sup>26</sup> Section 501.005(12)(h).

issuing reports to prevent or investigate fraud are also exempt.<sup>28</sup> Resellers of consumer information are also exempt, however, they must honor a freeze placed on a consumer report.<sup>29</sup>

### Fees

An agency may not charge a fee to a victim of identity theft who has submitted, at the time the freeze is requested, a copy of a valid investigative or incident report or complaint with a law enforcement agency concerning the unlawful use of the victim's identifying information by another.<sup>30</sup> The bill, however, allows an agency to charge a fee, not to exceed \$10, when a consumer elects to place, remove, or temporarily lift a security freeze on his or her consumer report.<sup>31</sup> Additionally, a consumer may be charged a fee, not to exceed \$10, if the consumer forgets or misplaces the identification number or password provided by the agency and the agency must reissue the information or provide new information to the consumer.<sup>32</sup>

### Consumer Information

An agency may not change a consumer's official information in a consumer report when a freeze is in effect without sending a written confirmation of the change to the consumer within 30 days of making the change.<sup>33</sup> "Official information" includes the consumer's name, address, date of birth, and social security number.<sup>34</sup> In the case of an address change, the written confirmation must be sent to both the new and former addresses of the consumer.<sup>35</sup> Nevertheless, a written confirmation is not required for technical modifications to a consumer's official information, this information can include name and street abbreviations, complete spellings, or transposition of numbers or letters.<sup>36</sup>

### Cause of Action

The bill creates a new cause of action for any person who is aggrieved by a violation of the provisions of the bill.<sup>37</sup> The provisions for a civil action are:

- Any person who willfully fails to comply with any requirement of the bill with respect to any consumer is liable to that consumer for actual damages sustained by the consumer as a result of the failure or damages of not less than \$100 and not more than \$1,000;<sup>38</sup>
- Any individual who obtains a consumer report under false pretenses or knowingly without a permissible purpose is liable to the consumer for actual damages sustained by the consumer as a result of the failure or damages of not less than \$100 and not more than \$1,000, whichever is

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<sup>27</sup> Section 501.005(15)(a). The bill provides that a check services company "issues authorizations for the purpose of approving or processing negotiable instruments, electronic funds transfers, or similar methods of payment." *Id.* A demand deposit account information service company "issues reports regarding account closures due to fraud, substantial overdrafts, automatic teller machine abuse, or similar negative information regarding a consumer to inquiring banks or other financial institutions for use only in reviewing a consumer request for a demand deposit account at the inquiring bank or financial institution, as defined in s. 655.005(1)(g) or (h), or in federal law." Section 501.005(15)(b).

<sup>28</sup> Section 501.005(15)(b).

<sup>29</sup> Section 501.005(15)(c). Specifically, the bill provides that the provisions of the bill do not apply to "[a] consumer reporting agency that acts only as a reseller of credit information by assembling and merging information contained in the database of another consumer reporting agency or multiple consumer reporting agencies and does not maintain a permanent database of credit information from which new consumer reports are produced. However, a consumer reporting agency shall honor any security freeze placed on a consumer report by another consumer reporting agency." *Id.*

<sup>30</sup> Section 501.005(13).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Section 501.005(14).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Section 501.005(16).

<sup>38</sup> Section 501.005(16)(a).

greater. Any person who obtains a consumer report from an agency under false pretenses or knowingly without a permissible purpose is liable to the agency for actual damages sustained by the agency or \$1,000, whichever is greater;<sup>39</sup>

- Punitive damages may be assessed for willful violations of the bill;<sup>40</sup>
- Any person who is negligent in failing to comply with any requirement imposed by the bill with respect to any consumer is liable to that consumer for any actual damages sustained by the consumer as a result of the failure, plus the costs of the action together with reasonable attorney's fees;<sup>41</sup> and
- If a court determines an unsuccessful pleading, motion, or other paper filed in connection with an action under this bill was filed in bad faith or for purposes of harassment, the court must award to the prevailing party reasonable attorney's fees in relation to the work performed in responding to that pleading, motion, or other paper.<sup>42</sup>

### Disclosure

An agency must include a written summary of all rights under the bill to a consumer when sending the consumer a written disclosure. The bill details the information that must be included in the written summary of consumer rights, including the right to civil action. Agencies which maintain consumer reports on a nationwide basis must provide a toll free telephone number for the consumer to use to communicate with the agency.<sup>43</sup>

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<sup>39</sup> Section 501.005(16)(b).

<sup>40</sup> Section 501.005(16)(c).

<sup>41</sup> Section 501.005(16)(d).

<sup>42</sup> Section 501.005(16)(e).

<sup>43</sup> Specifically, the bill provides in s. 501.005(17) what a written disclosure must consist of:

Any written disclosure by a consumer reporting agency to any consumer, pursuant to 15 U.S.C. s. 1681g, shall include a written summary of all rights the consumer has under this section, and, in the case of a consumer reporting agency which compiles and maintains consumer reports on a nationwide basis, a toll-free telephone number which the consumer can use to communicate with the consumer reporting agency. The information set forth in paragraph (b) of the written summary of rights must be in at least 14-point boldface type in capital letters. The written summary of rights required under this section is sufficient if it is substantially in the following form:

(a) You have a right to place a "security freeze" on your consumer report, which will prohibit a consumer reporting agency from releasing any information in your consumer report without your express authorization. A security freeze must be requested in writing by certified mail to a consumer reporting agency. The security freeze is designed to prevent credit, loans, and services from being approved in your name without your consent.

(b) YOU SHOULD BE AWARE THAT USING A SECURITY FREEZE TO CONTROL ACCESS TO THE PERSONAL AND FINANCIAL INFORMATION IN YOUR CONSUMER REPORT MAY DELAY, INTERFERE WITH, OR PROHIBIT THE TIMELY APPROVAL OF ANY SUBSEQUENT REQUEST OR APPLICATION YOU MAKE REGARDING A NEW LOAN, CREDIT, MORTGAGE, INSURANCE, GOVERNMENT SERVICES OR PAYMENTS, RENTAL HOUSING, EMPLOYMENT, INVESTMENT, LICENSE, CELLULAR PHONE, UTILITIES, DIGITAL SIGNATURE, INTERNET CREDIT CARD TRANSACTION, OR OTHER SERVICES, INCLUDING AN EXTENSION OF CREDIT AT POINT OF SALE.

(c) When you place a security freeze on your consumer report, you will be provided a personal identification number or password to use if you choose to remove the freeze on your consumer report or authorize the release of your consumer report for a designated period of time after the security freeze is in place. To provide that authorization, you must contact the consumer reporting agency and provide all of the following:



**C. SECTION DIRECTORY:**

Section 1 creates s. 501.005, F.S., providing for a credit freeze by a consumer.

Section 2 provides an effective date of July 1, 2006.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill permits a consumer reporting agency to charge a reasonable fee, not to exceed \$10, to a consumer who elects to place, remove, or temporarily lift a security freeze on his or her consumer report, with the exception of a victim of identity theft.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

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1. The personal identification number or password.

2. Proper identification to verify your identity.

3. Information specifying the period of time for which the report shall be made available. (d) A consumer reporting agency must authorize the release of your consumer report no later than 3 business days after receiving the above information.

(e) A security freeze does not apply to a person or entity, or its affiliates, or collection agencies acting on behalf of the person or entity, with which you have an existing account, that requests information in your consumer report for the purposes of reviewing or collecting the account. Reviewing the account includes activities related to account maintenance, monitoring, credit line increases, and account upgrades and enhancements.

(f) You have the right to bring a civil action against anyone, including a consumer reporting agency, who fails to comply with the provisions of s. 501.005, Florida Statutes, which governs the placing of a consumer report security freeze on your consumer report.

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The United States Constitution, Art. 1, s. 8, cl. 3, provides that Congress has the power to regulate commerce "among the several States." Despite the specific language of that clause, "it is well settled that it [the clause] has a 'dormant' aspect as well, namely, one that serves as 'a substantive restriction on permissible state regulation on interstate commerce.'"<sup>44</sup> The commerce clause "prohibits economic protectionism--that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."<sup>45</sup> The commerce clause, further, "requires that some aspects of trade generally must remain free from interference by the States. When a State ventures excessively into the regulation of these aspects of commerce, it 'trespasses upon national interests' and the courts will hold the state regulation invalid under the Clause [commerce clause] alone."<sup>46</sup>

To determine if a statute violates the dormant commerce clause, courts "employ two tiers of analysis."<sup>47</sup>

If the scheme directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. Only if such a regulation is shown to advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives will it be upheld. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. Though the two tiers of analysis are not clearly distinguishable, in either situation, the critical consideration is the overall effect of the statute on both local and interstate activity.<sup>48</sup>

In other words:

The Constitution, when conferring upon Congress the power to regulate commerce, never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, even though the legislation may indirectly affect the commerce of the country; legislation may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution. Where a statute has only indirect effects on interstate commerce and regulates evenhandedly, the court examines whether the state's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Factors to be considered include:

- the putative benefits of the challenged enactment

<sup>44</sup> *Bainbridge v. Turner*, 311 F.3d 1104, 1108 (11th Cir. 2002)(citing *Dennis v. Higgins*, 498 U.S. 439, 447 (1991)).

<sup>45</sup> *Bainbridge*, 311 F.3d at 1108 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988)).

<sup>46</sup> *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 669 (1981)(quoting *Great A&P Tea Co. v. Cottrell*, 424 U.S. 366, 373 (1976)).

<sup>47</sup> *Bainbridge*, 311 F.3d at 1108.

<sup>48</sup> *Bainbridge*, 311 F.3d at 1109 (internal citations and quotations omitted).

- the nature of the interest involved
- the burdens on interstate commerce caused by the enactment
- whether the burdens are clearly excessive in relation to the benefits
- whether the state's interests could be promoted as well with a lesser burden on interstate commerce.<sup>49</sup>

Several sections of the bill would need to be considered in light of the dormant commerce clause restrictions. Section 501.005(7) requires consumer reporting agencies, not solely those contained within this state, to develop telephonic communication or any form of secure electronic media to receive and process requests from consumers so that security freezes could be temporarily lifted. Section 501.005(13), authorizes a consumer reporting agency to charge a fee to place, remove, or temporarily lift a security freeze, however the section imposes a cap on that fee above which the consumer reporting agency may not exceed. That cap is irrespective of the costs that may be associated with compliance with the bill. Finally, s. 501.005(17), requires that a written disclosure by a consumer reporting agencies to any consumer, pursuant to 15 U.S.C. s. 1681g<sup>50</sup>, must include a written summary of all rights the consumer has under this bill. Further, s. 501.005(17), requires "in the case of a consumer reporting agency which compiles and maintains consumer reports on a nationwide basis, a toll-free telephone number which the consumer can use to communicate with the consumer reporting agency."

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

On October 18, 2005, the Economic Development, Trade and Banking Committee adopted a strike-all amendment to the bill. The amendment does the following:

- Decreases the time in which a consumer reporting agency must send a written confirmation of the security freeze to a consumer from 10 days to 5 days.
- Provides that a consumer credit reporting agency must strive to process within 15 minutes a request from a consumer to temporarily lift his or her security freeze.
- Clarifies the entities that are exempt from a security freeze and may access a credit report to include state agencies, local or state law enforcement and other appropriate persons.
- Provides that a consumer credit reporting agency may not charge a consumer to place a security freeze on his or her credit report, but may impose a fee, of not more than \$5, for the consumer to temporarily lift or remove a security freeze from his or her credit report.
- Provides that a consumer credit reporting agency may charge a fee, not more than \$5, if a consumer fails to retain the original personal identification number or password provided by the consumer credit reporting agency and the agency must reissue the information to the consumer.
- Clarifies that a civil action may be brought for the knowing or willful violation of the bill's provisions.
- Provides that a consumer wishing to place a security freeze on his or her credit report must do so in writing by certified mail to a consumer credit reporting agency.

<sup>49</sup> 15A Am. Jur. 2d, Commerce, s. 34.

<sup>50</sup> This portion of the U.S. Code provides that "[u]pon request and identification, the reporting agency is required to divulge the information in its files concerning the interested consumer." *Hovater v. Equifax, Inc.*, 823 F.2d 413, 417(11th Cir. 1987).

- Clarifies that the temporary lifting of a security freeze is for a specific period of time, not for a specific recipient.

On January 11, 2006, the Agriculture Committee adopted a strike-all amendment to the bill. The amendment:

- Provides definitions for the term “consumer report security freeze” or “security freeze”.
- Changes the terms “consumer credit reporting agencies” to “consumer reporting agencies” and “credit reports” to “consumer reports” for uniformity with the federal Fair Credit Reporting Act.
- Allows for a reasonable fee, not to exceed \$10, to place, temporarily lift or permanently remove a freeze, or to receive a new PIN.
- Provides that documented victims of identity theft may place a freeze at no charge.
- Adopts the civil liability language of the Fair Credit Reporting Act.
- Includes penalties for both willful and negligent violations of the security freeze. The liability includes those entities who fail to comply, willfully or negligently, with the freeze, as well as those individuals who knowingly obtain a consumer report under false pretenses or knowingly without a permissible purpose.
- Allows for attorney’s fees for actions filed in bad faith or for the purposes of harassment.
- Eliminates the 15 minute “goal” for removing the freeze.
- Requires the portion of the “written summary of rights” relating to items that could be impacted by the credit freeze, to be in at least 14 point, boldface, capital letters.

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CHAMBER ACTION

The Agriculture Committee recommends the following:

**Council/Committee Substitute**

Remove the entire bill and insert:

A bill to be entitled

An act relating to security of consumer report information; creating s. 501.005, F.S.; defining "consumer report security freeze"; authorizing a consumer to place a security freeze on his or her consumer report; providing procedures and requirements with respect to the placement, temporary suspension, and removal of a security freeze on a consumer report; authorizing a consumer to allow specified temporary access to his or her consumer report during a security freeze; providing procedures with respect to such temporary access; providing for removal of a security freeze when a consumer report was frozen due to a material misrepresentation of fact by the consumer; providing applicability; prohibiting a consumer reporting agency from charging a fee to a victim of identity theft who requests a security freeze on a consumer report; authorizing consumer reporting agencies to charge a fee to place, remove, or temporarily lift a security freeze and

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to reissue a personal identification number; restricting the change of specified information in a consumer report when a security freeze is in effect; specifying applicability with respect to certain consumer reporting agencies; specifying entities that are exempt from placing a security freeze on a consumer report; providing for civil remedy; providing requirements with respect to written disclosure by a consumer reporting agency of procedures and consumer rights associated with a security freeze; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 501.005, Florida Statutes, is created to read:

501.005 Consumer report security freeze.--

(1) For purposes of this section, "consumer report security freeze" or "security freeze" means a notice placed in a consumer report that prohibits a consumer reporting agency, as defined in 15 U.S.C. s. 1681a(f), from releasing the consumer report, credit score, or any information contained within the consumer report, to a third party without the express authorization of the consumer. This section does not prevent a consumer reporting agency from advising a third party that a security freeze is in effect with respect to the consumer report.

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50        (2) A consumer may place a security freeze on his or her  
51 consumer report by making a request in writing by certified mail  
52 to a consumer reporting agency.

53        (3) A consumer reporting agency shall place a security  
54 freeze on a consumer report no later than 5 business days after  
55 receiving a request from the consumer.

56        (4) The consumer reporting agency shall send a written  
57 confirmation of the security freeze to the consumer within 5  
58 business days after instituting the security freeze and shall  
59 provide the consumer with a unique personal identification  
60 number or password to be used by the consumer when providing  
61 authorization for the limited release of his or her consumer  
62 report for a designated period of time during the security  
63 freeze as provided in subsection (5).

64        (5) A consumer may allow his or her consumer report to be  
65 accessed for a designated period of time while a security freeze  
66 is in effect by contacting the consumer reporting agency and  
67 requesting that the freeze be temporarily lifted. The consumer  
68 must provide the following information to the consumer reporting  
69 agency as part of the request:

70            (a) Proper identification as determined by the consumer  
71 reporting agency.

72            (b) The unique personal identification number or password  
73 provided by the consumer reporting agency pursuant to subsection  
74 (4).

75            (c) Information specifying the period of time for which  
76 the report shall be made available.

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77        (6) A consumer reporting agency that receives a request  
78 from a consumer to temporarily lift a freeze on a consumer  
79 report pursuant to subsection (5) shall comply with the request  
80 no later than 3 business days after receiving the request.

81        (7) A consumer reporting agency shall develop telephonic  
82 communication or any form of secure electronic media to receive  
83 and process a request from a consumer pursuant to subsection  
84 (5).

85        (8) A consumer reporting agency shall temporarily lift or  
86 remove a security freeze placed on a consumer report only in the  
87 following instances:

88        (a) Upon consumer request, pursuant to subsection (5) or  
89 subsection (11).

90        (b) If the consumer report was frozen due to a material  
91 misrepresentation of fact by the consumer. If a consumer  
92 reporting agency intends to remove a security freeze on a  
93 consumer report pursuant to this paragraph, the consumer  
94 reporting agency shall notify the consumer in writing prior to  
95 removing the security freeze.

96        (9) A third party requesting access to a consumer report  
97 on which a security freeze is in effect in connection with an  
98 application for credit or other permissible use may treat the  
99 application as incomplete if the consumer has not authorized a  
100 temporary lifting of the security freeze for the period of time  
101 during which the request is made.

102        (10) If a consumer requests a security freeze, the  
103 consumer reporting agency shall disclose to the consumer all  
104 information relevant to the process of instituting, temporarily



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lifting, and removing a security freeze and shall include the disclosure required by subsection (17).

(11) A security freeze shall remain in place until the consumer requests that it be removed. A consumer reporting agency shall remove a security freeze within 3 business days after receiving a request for removal from the consumer, who, upon making the request for removal, must provide the following:

(a) Proper identification as determined by the consumer reporting agency.

(b) The unique personal identification number or password provided by the consumer reporting agency pursuant to subsection (4).

(12) The provisions of this section do not apply to the use of a consumer report by the following persons or for the following reasons:

(a) A person to whom the consumer owes a financial obligation or a subsidiary, affiliate, or agent of the person, or an assignee of a financial obligation owed by the consumer to the person, or a prospective assignee of a financial obligation owed by the consumer to the person in conjunction with the proposed purchase of the financial obligation, with which the consumer has or had prior to assignment an account or contract, including a demand deposit account, or to whom the consumer issued a negotiable instrument, for the purposes of reviewing the account or collecting the financial obligation owed for the account, contract, or negotiable instrument. For purposes of this paragraph, "reviewing the account" includes activities

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132 related to account maintenance, monitoring, credit line  
133 increases, and account upgrades and enhancements.

134 (b) A subsidiary, affiliate, agent, assignee, or  
135 prospective assignee of a person to whom access has been granted  
136 under this section for purposes of facilitating the extension of  
137 credit or other permissible use.

138 (c) A state agency acting within its lawful investigative  
139 or regulatory authority.

140 (d) A state or local law enforcement agency acting to  
141 investigate a crime or conducting a criminal background check.

142 (e) Any person administering a credit file monitoring  
143 subscription service to which the consumer has subscribed.

144 (f) Any person for the purpose of providing a consumer  
145 with a copy of the consumer report upon the consumer's request.

146 (g) Pursuant to a court order lawfully entered.

147 (h) The use of credit information for the purposes of  
148 prescreening as provided for by the federal Fair Credit  
149 Reporting Act.

150 (13) A consumer reporting agency shall not charge any fee  
151 to a victim of identity theft who has submitted, at the time the  
152 security freeze is requested, a copy of a valid investigative or  
153 incident report or complaint with a law enforcement agency about  
154 the unlawful use of the victim's identifying information by  
155 another person. A consumer reporting agency may charge a  
156 reasonable fee, not to exceed \$10, to a consumer who elects to  
157 place, remove, or temporarily lift a security freeze on his or  
158 her consumer report. A consumer may be charged a reasonable fee,  
159 not to exceed \$10, if the consumer fails to retain the original

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160 personal identification number or password provided by the  
161 consumer reporting agency, and the agency must reissue the  
162 personal identification number or password or provide a new  
163 personal identification number or password to the consumer.

164 (14) If a security freeze is in effect, a consumer  
165 reporting agency shall not change any of the following official  
166 information in a consumer report without sending a written  
167 confirmation of the change to the consumer within 30 days after  
168 the change is posted to the consumer's file:

169 (a) Name.

170 (b) Address.

171 (c) Date of birth.

172 (d) Social security number.

173  
174 Written confirmation is not required for technical corrections  
175 of a consumer's official information, including name and street  
176 abbreviations, complete spellings, or transposition of numbers  
177 or letters. In the case of an address change, the written  
178 confirmation shall be sent to both the new address and the  
179 former address.

180 (15) The provisions of this section do not apply to the  
181 following entities:

182 (a) A check services company, which issues authorizations  
183 for the purpose of approving or processing negotiable  
184 instruments, electronic funds transfers, or similar methods of  
185 payment.

186 (b) A demand deposit account information service company,  
187 which issues reports regarding account closures due to fraud,

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188 substantial overdrafts, automatic teller machine abuse, or  
189 similar negative information regarding a consumer to inquiring  
190 banks or other financial institutions for use only in reviewing  
191 a consumer request for a demand deposit account at the inquiring  
192 bank or financial institution, as defined in s. 655.005(1)(g) or  
193 (h), or in federal law.

194 (c) A consumer reporting agency that acts only as a  
195 reseller of credit information by assembling and merging  
196 information contained in the database of another consumer  
197 reporting agency or multiple consumer reporting agencies and  
198 does not maintain a permanent database of credit information  
199 from which new consumer reports are produced. However, a  
200 consumer reporting agency shall honor any security freeze placed  
201 on a consumer report by another consumer reporting agency.

202 (d) A fraud prevention services company issuing reports to  
203 prevent or investigate fraud.

204 (16) In addition to any other penalties or remedies  
205 provided under law, a person who is aggrieved by a violation of  
206 the provisions of this section may bring a civil action as  
207 authorized by this subsection.

208 (a) Any person who willfully fails to comply with any  
209 requirement imposed under this section with respect to any  
210 consumer is liable to that consumer for actual damages sustained  
211 by the consumer as a result of the failure or damages of not  
212 less than \$100 and not more than \$1,000.

213 (b) Any individual who obtains a consumer report under  
214 false pretenses or knowingly without a permissible purpose is  
215 liable to the consumer for actual damages sustained by the

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216 consumer as a result of the failure or damages of not less than  
217 \$100 and not more than \$1,000, whichever is greater. Any person  
218 who obtains a consumer report from a consumer reporting agency  
219 under false pretenses or knowingly without a permissible purpose  
220 is liable to the consumer reporting agency for actual damages  
221 sustained by the consumer reporting agency or \$1,000, whichever  
222 is greater.

223 (c) Punitive damages may be assessed for willful  
224 violations of this section.

225 (d) Any person who is negligent in failing to comply with  
226 any requirement imposed under this section with respect to any  
227 consumer is liable to that consumer for any actual damages  
228 sustained by the consumer as a result of the failure, plus the  
229 costs of the action together with reasonable attorney's fees.

230 (e) Upon a finding by the court that an unsuccessful  
231 pleading, motion, or other paper filed in connection with an  
232 action under this subsection was filed in bad faith or for  
233 purposes of harassment, the court shall award to the prevailing  
234 party attorney's fees that are reasonable in relation to the  
235 work performed in responding to the pleading, motion, or other  
236 paper.

237 (17) Any written disclosure by a consumer reporting agency  
238 to any consumer, pursuant to 15 U.S.C. s. 1681g, shall include a  
239 written summary of all rights the consumer has under this  
240 section, and, in the case of a consumer reporting agency which  
241 compiles and maintains consumer reports on a nationwide basis, a  
242 toll-free telephone number which the consumer can use to  
243 communicate with the consumer reporting agency. The information

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244 set forth in paragraph (b) of the written summary of rights must  
245 be in at least 14-point boldface type in capital letters. The  
246 written summary of rights required under this section is  
247 sufficient if it is substantially in the following form:

248       (a) You have a right to place a "security freeze" on your  
249 consumer report, which will prohibit a consumer reporting agency  
250 from releasing any information in your consumer report without  
251 your express authorization. A security freeze must be requested  
252 in writing by certified mail to a consumer reporting agency. The  
253 security freeze is designed to prevent credit, loans, and  
254 services from being approved in your name without your consent.

255       (b) YOU SHOULD BE AWARE THAT USING A SECURITY FREEZE TO  
256 CONTROL ACCESS TO THE PERSONAL AND FINANCIAL INFORMATION IN YOUR  
257 CONSUMER REPORT MAY DELAY, INTERFERE WITH, OR PROHIBIT THE  
258 TIMELY APPROVAL OF ANY SUBSEQUENT REQUEST OR APPLICATION YOU  
259 MAKE REGARDING A NEW LOAN, CREDIT, MORTGAGE, INSURANCE,  
260 GOVERNMENT SERVICES OR PAYMENTS, RENTAL HOUSING, EMPLOYMENT,  
261 INVESTMENT, LICENSE, CELLULAR PHONE, UTILITIES, DIGITAL  
262 SIGNATURE, INTERNET CREDIT CARD TRANSACTION, OR OTHER SERVICES,  
263 INCLUDING AN EXTENSION OF CREDIT AT POINT OF SALE.

264       (c) When you place a security freeze on your consumer  
265 report, you will be provided a personal identification number or  
266 password to use if you choose to remove the freeze on your  
267 consumer report or authorize the release of your consumer report  
268 for a designated period of time after the security freeze is in  
269 place. To provide that authorization, you must contact the  
270 consumer reporting agency and provide all of the following:

271       1. The personal identification number or password.

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272        2. Proper identification to verify your identity.  
 273        3. Information specifying the period of time for which the  
 274 report shall be made available.  
 275        (d) A consumer reporting agency must authorize the release  
 276 of your consumer report no later than 3 business days after  
 277 receiving the above information.  
 278        (e) A security freeze does not apply to a person or  
 279 entity, or its affiliates, or collection agencies acting on  
 280 behalf of the person or entity, with which you have an existing  
 281 account, that requests information in your consumer report for  
 282 the purposes of reviewing or collecting the account. Reviewing  
 283 the account includes activities related to account maintenance,  
 284 monitoring, credit line increases, and account upgrades and  
 285 enhancements.  
 286        (f) You have the right to bring a civil action against  
 287 anyone, including a consumer reporting agency, who fails to  
 288 comply with the provisions of s. 501.005, Florida Statutes,  
 289 which governs the placing of a consumer report security freeze  
 290 on your consumer report.  
 291        Section 2. This act shall take effect July 1, 2006.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

Bill No. **HB 37 CS**

COUNCIL/COMMITTEE ACTION

ADOPTED \_\_\_\_\_ (Y/N)  
ADOPTED AS AMENDED \_\_\_\_\_ (Y/N)  
ADOPTED W/O OBJECTION \_\_\_\_\_ (Y/N)  
FAILED TO ADOPT \_\_\_\_\_ (Y/N)  
WITHDRAWN \_\_\_\_\_ (Y/N)  
OTHER \_\_\_\_\_

1

Council/Committee hearing bill: Civil Justice Committee  
Representative Adams offered the following:

**Amendment**

Remove line(s) 81 and insert:

(7) A consumer reporting agency doing business in this  
state shall develop telephonic



HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 2 (for drafter's use only)

Bill No. **HB 37 CS**

COUNCIL/COMMITTEE ACTION

ADOPTED \_\_\_\_\_ (Y/N)  
ADOPTED AS AMENDED \_\_\_\_\_ (Y/N)  
ADOPTED W/O OBJECTION \_\_\_\_\_ (Y/N)  
FAILED TO ADOPT \_\_\_\_\_ (Y/N)  
WITHDRAWN \_\_\_\_\_ (Y/N)  
OTHER \_\_\_\_\_

2

Council/Committee hearing bill: Civil Justice Committee

Representative Adams offered the following:

**Amendment**

Remove line(s) 237-238 and insert:

(17) Any written disclosure by a consumer reporting  
agency, pursuant to 15 U.S.C. s. 1681g, to any consumer residing  
in this state shall include a



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 519                      Internet Screening in Public Libraries  
**SPONSOR(S):** Kravitz  
**TIED BILLS:** None                      **IDEN./SIM. BILLS:** SB 960

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee		Shaddock	Bond
2) Transportation & Economic Development Appropriations Committee			
3) Justice Council			
4)			
5)			

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### SUMMARY ANALYSIS

This bill addresses the access by adults and children to internet pornography in public libraries. The bill requires public libraries to adopt an internet safety policy and install technology protection measures on all public computers. The protection measures are to prevent adults from using the libraries computers to access child pornography or obscene visual depictions, and to prevent minors from accessing child pornography and visual depictions that are obscene or harmful to minors. The protection measures can be disabled upon an adult's request to use the computer for bona fide research or other lawful purposes. Libraries are precluded from maintaining a record of the adults who request this disablement.

The bill authorizes the Division of Library and Information Services to adopt rules requiring the head of each administrative unit to give an annual written statement, under penalty of perjury, that all public library locations within the unit are in compliance with this section, as a condition of receiving state funds. The bill provides that a civil cause of action may arise in favor of any state resident for a library's non-compliance with the requirements of the bill. A \$100 dollar a day fine may be imposed upon the administrative unit governing the library for each day the library fails to comply with this bill.

This bill appears to have a minimal negative fiscal impact on local governments. This bill does not appear to have a fiscal impact on state government.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- This bill creates additional responsibilities for public libraries and their administrative units. The bill establishes rule-making authority in the Department of State, Division of Library and Information Services.

Empower Families -- This bill seeks to benefit families by decreasing the possibility of children and adults being exposed to pornography at public libraries.

#### B. EFFECT OF PROPOSED CHANGES:

##### Background

##### Federal Law

In 2000, Congress enacted the Children's Internet Protection Act ("CIPA"), which requires public libraries participating in certain internet technology programs to certify that they are using computer filtering software to prevent the on-screen depiction of obscenity, child pornography, or other material harmful to minors.<sup>1</sup> The Supreme Court upheld CIPA in *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003), determining the law did not violate the First Amendment's free speech clause nor did it impose an unconstitutional condition on public libraries. CIPA does not impose any penalties on libraries that choose not to install filtering software; however, libraries that choose to offer unfiltered internet access will not receive federal funding for acquiring educational internet resources.<sup>2</sup>

##### State Law

Currently, state law does not contain any requirements that public libraries place internet filters on the public computers. Nevertheless, there are a number of statutes that prohibit the display of obscene materials to minors and child pornography.

"Obscenity" is defined in s. 847.001(10), F.S., as:

the status of material which:

(a) The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;

(b) Depicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and

(c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

This definition of obscenity is taken directly from the Supreme Court's definition in *Miller v. California*, 413 U.S. 15 (1973).<sup>3</sup>

"Harmful to minors" is defined in s. 847.001(6), F.S., as:

<sup>1</sup> National Conference of State Legislatures, *Children and the Internet: Laws Relating to Filtering, Blocking and Usage Policies in Schools and Libraries*, Feb. 17, 2005.

<sup>2</sup> *U.S. v. Am. Libraries Ass'n*, 539 U.S. 194, 212 (2003)(plurality opinion).

<sup>3</sup> *Haggerty v. State*, 531 So. 2d 364, 365 (Fla. 1st DCA 1988).

any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:

- (a) Predominantly appeals to the prurient, shameful, or morbid interests of minors;
- (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
- (c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

Section 847.0133, F.S., prohibits any person from knowingly selling, renting, loaning, giving away, distributing, transmitting, or showing any obscene material to a minor.<sup>4 5</sup> Section 847.0137, F.S., prohibits the transmission of any image, data, or information, constituting child pornography through the internet or any other medium. Section 847.0138, F.S. prohibits the transmission of material harmful to minors to a minor by means of electronic device or equipment. Section 847.0139, F.S., provides immunity from civil liability for anyone reporting to a law enforcement officer what the person reasonably believes to be child pornography or the transmission to a minor of child pornography or any information, image, or data that is harmful to minors. Section 847.03, F.S., requires any officer arresting a person charged with an offense under s. 847.011, F.S., relating to acts relating to lewd or obscene materials, to seize such materials at the time of the arrest.

#### Current Library Internet Policies

The Department of State, Division of Library and Information Services, conducted a survey of Florida's public libraries to ascertain their internet use policies and filtering practices.<sup>6</sup> Out of 149 county and municipal libraries in Florida's 67 counties, 139 libraries responded to the survey. All of the libraries who answered the survey had locally adopted internet use policies, and 138 of the libraries prohibited the display of obscene or offensive images.<sup>7</sup> Of the libraries responding to the survey, 110 currently had filtering software or technology on their computers, and twenty-three did not filter.<sup>8</sup> Fourteen counties have one or more libraries that do not have filters, another four libraries only filter computers in the children's or youth section of the library, and three of the counties that did not have filters indicated that they would be installing filters soon or were in the process of negotiating with vendors.<sup>9</sup>

Three libraries reported that they were not CIPA compliant, twenty-nine libraries stated that CIPA did not apply to them, and the other 107 libraries indicated that they were CIPA compliant.<sup>10</sup>

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<sup>4</sup> Obscene materials means "any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing paper, card, picture, drawing, photograph, motion picture film, figure, image, videotape, videocassette, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose." Section 847.0133, F.S.

<sup>5</sup> The term "obscene" has the same meaning in s. 847.0133, F.S. as it has in s. 847.001, F.S.

<sup>6</sup> Department of State, Division of Library and Information Services, *Internet Policies & Filtering in Florida's Public Libraries Report*, March 21, 2005 (hereinafter "*Internet Policies*").

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

## Effect of Bill

### Definitions

The bill creates a new section, s. 257.44, F.S., requiring internet screening in public libraries. A number of terms that are crucial to an understanding of the requirements and prohibitions provided for in the bill are detailed below. The bill defines "public library" as "any library that is open to the public and that is established or maintained by a county, municipality, consolidated city-county government, special district, or special tax district, or any combination thereof."<sup>11</sup> Excluded from this definition are libraries open to the public that are maintained or established by a community college or state university. A "public computer" is any computer made available to the public and that has internet access.<sup>12</sup>

This bill requires a public library to enforce an internet safety policy providing for:

- Installation and operation of a protection measure on all public computers in the library that restricts access by adults to visual depictions that are obscene or constitute child pornography and that restricts access by minors to visual depictions that are obscene, constitute child pornography, or are harmful to minors, and
- Disablement of the protection measure when an adult requests to use the computer for bona fide research or other lawful purpose.

A "technology protection measure" is software or equivalent technology that blocks or filters internet access to the visual depictions that are obscene, contain child pornography, or that are harmful to minors.<sup>13</sup>

The definition of child pornography is the same definition that appears in s. 847.001, F.S. For the purposes of this bill, harmful to minors is defined as:

[A]ny picture, image, graphic image file, or other visual depiction that:

1. Taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;
2. Depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals; and
3. Taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.<sup>14</sup>

"Obscene" is defined as it is currently in s. 847.001, F.S.<sup>15</sup> "Administrative unit" is defined as "the entity designated by a local government body as responsible for administering all public libraries established or maintained by that local government body."<sup>16</sup>

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<sup>11</sup> Section 257.44(1)(g).

<sup>12</sup> Section 257.44(1)(f).

<sup>13</sup> Section 257.44(1)(i).

<sup>14</sup> Section 257.44(1)(c).

<sup>15</sup> Section 257.44(1)(e).

<sup>16</sup> Section 257.44(1)(a).

## Internet Policy

Each public library is required to post a conspicuous notice informing library patrons of the internet safety policy and indicating that the policy is available for review.<sup>17</sup> Libraries must disable the protection measure upon the request of any adult who wishes to use the computer for bona fide research or other lawful purpose,<sup>18</sup> and the library may not maintain a record containing the names of any adult who has requested the protection measure be disabled.<sup>19</sup>

## Civil Action

Should a public library knowingly fail to make reasonable efforts to comply with the requirements of the bill, any state resident may seek to enforce the requirements of the bill by filing a civil action.<sup>20</sup> Reasonable efforts are defined as the public library, in implementing the policy required by this bill, in its ordinary course of business: posts its internet safety policy; uses a technology protection measure on all public computers; and disables the protection measure when an adult has requested to use the computer for bona fide research or other lawful purpose.<sup>21</sup>

Before initiating a civil action and within 45 days after the public library's alleged failure to make reasonable efforts to comply with the requirements of this bill, a resident is required to mail a written notice of intent to file a civil action to the head of the applicable administrative unit.<sup>22</sup> The notice must identify each public library location involved and specify the facts and circumstances alleged to constitute a violation.<sup>23</sup> Within 45 days of receipt of this notice, the administrative unit may mail a written response to the resident who provided the notice.<sup>24</sup> The written response must specify the efforts each public library location identified in the notice is making to comply with the requirements of this bill.<sup>25</sup>

If the resident does not receive a written response within 60 days after receipt of the notice by the head of the administrative unit or if the written response fails to indicate that the public library is making reasonable efforts to comply with the bill, the resident may institute a civil action to seek injunctive relief to enforce the provisions of the bill in the circuit court in the county in which the administrative unit is located.<sup>26</sup>

A court may impose a fine on the administrative unit in the amount of \$100 dollars per day per public library location that is found to have not made reasonable efforts to comply with the bill,<sup>27</sup> and order the administrative unit that is fined to pay reasonable attorney's fees and costs to the prevailing resident.<sup>28</sup> Should the court determine the civil action was filed in bad faith or was frivolous, the court may order the resident to pay reasonable attorney's fees and costs to the administrative unit.<sup>29</sup> Except as provided above, the bill does not authorize a cause of action in favor of any person due to a public library's failure to comply.<sup>30</sup>

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<sup>17</sup> Section 257.44(2)(b).

<sup>18</sup> Section 257.44(2)(a)(2).

<sup>19</sup> Section 257.44(2)(c).

<sup>20</sup> Section 257.44(3).

<sup>21</sup> Section 257.44(1)(h).

<sup>22</sup> Section 257.44(3)(a).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* All of the mailings mentioned above must be certified with return receipt requested.

<sup>26</sup> Section 257.44(3)(b).

<sup>27</sup> The fine accrues from the date that the head of the administrative unit received the notice of intended civil action until the date upon which the public library location begins making reasonable efforts to comply. Section 257.44(3)(c)(1), F.S.

<sup>28</sup> Section 257.44(3)(c)(1)-(2).

<sup>29</sup> Section 257.44(3)(c)(2).

<sup>30</sup> Section 257.44(5).

The Clerk of the Circuit Court is to act as the depository for all paid civil fines based upon this bill.<sup>31</sup> The Clerk is authorized to retain a service charge of one (\$1) dollar for each payment and the Clerk is directed to, on a monthly basis, transfer the fines collected to the Department of Revenue for deposit in the Records Management Trust Fund.<sup>32</sup>

#### Rule-Making Authority

The Division of Library and Information Services must adopt administrative rules requiring the head of each administrative unit to annually attest in writing, under penalty of perjury, that all libraries within the administrative unit are in compliance with the internet safety policy as a condition of the receipt of any state funds being distributed under ch. 257, F.S.<sup>33</sup>

#### C. SECTION DIRECTORY:

Section 1 creates s. 257.44, F.S., requiring internet screening in public libraries.

Section 2 provides a legislative finding that the installation and operation of technology protection measures in public libraries to protect against adult access to obscene visual depictions or child pornography, or access by minors to obscene visual depictions, child pornography, or images that are harmful to minors, fulfills an important state interest.

Section 3 provides an effective date of October 1, 2006.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

##### 2. Expenditures:

The fiscal analysis provided by the Department of State states that there is no fiscal impact to the Department. However, this bill would appear to have a minimal but unknown fiscal impact on state government. The Department of State is required to promulgate rules concerning annual compliance by libraries, and the Department is required to collect and maintain those annual attestations.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

None.

##### 2. Expenditures:

The Department of State estimates that this bill will require recurring expenditures of \$108,240 annually for libraries not currently using filtering software. The department estimates that the total recurring cost to all libraries regulated by this bill for filtering software is \$666,600.

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

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<sup>31</sup> Section 257.44(3)(d).

<sup>32</sup> *Id.*

<sup>33</sup> Section 257.44(4).



#### D. FISCAL COMMENTS:

None.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

Article VII, s. 18(a), Florida Constitution, provides that no county or municipality can be required to take an action requiring the expenditure of funds unless certain conditions are met. It can be argued that this bill requires counties and municipalities to spend funds to purchase filtering software. However, if a bill does not have a significant fiscal impact, then it is exempt from the mandate provision.<sup>34</sup> The current policy of the House and Senate Appropriations Committees is that if a bill requires an aggregate expenditure of more than \$0.10 per resident, or \$1.8 million, then the bill has a significant economic impact. Based upon the survey of Florida's public libraries and the fiscal analysis from the Department of State it appears that this bill will not impose a significant economic impact on counties and municipalities, and thus does not require an extraordinary vote as a mandate.

##### 2. Other:

###### Access by Minors

This bill may raise First Amendment concerns since the statute creates a new definition of "harmful to minors" that extends beyond the current definition found in s. 847.001(10), F.S., which is similar to the Supreme Court's definition of obscenity. Although obscenity is not a protected category of speech, "[s]exual expression which is indecent but not obscene is protected by the First Amendment."<sup>35</sup> In other words, obscene material is unprotected by the Constitution but indecent material is constitutionally protected. Hence, the new definition should be reviewed to determine whether it would infringe upon Constitutional protected speech.

For the purposes of this bill, harmful to minors is defined as:

[A]ny picture, image, graphic image file, or other visual depiction that:

1. Taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;
2. Depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals; and
3. Taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.<sup>36</sup>

This "harmful to minors" standard is a content-based regulation of speech<sup>37</sup>, which must be narrowly tailored to promote a compelling government interest.<sup>38</sup> However, internet access in a public library is

<sup>34</sup> Art. VII, s. 18(a), FLA. CONST.

<sup>35</sup> *Simmons v. State*, 886 So. 2d 399, 492-03 (Fla. 1st DCA 2004) (quoting *Sable Comm. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

<sup>36</sup> Section 257.44(1)(c).

<sup>37</sup> According to 16A Am. Jur. 2d, Constitutional Law s. 460:

not a traditional or designated public forum,<sup>39</sup> and a library “does not acquire internet terminals in order to create a public forum for Web publishers to express themselves.”<sup>40</sup>

The protection of children from harmful material is a compelling state interest, as “common sense dictates that a minor’s rights are not absolute,” and the legislature has the right to protect minors from the conduct of others.<sup>41</sup> The legislature has the responsibility and authority to protect all of the children in the state, and the state “has the prerogative to safeguard its citizens, particularly children, from potential harm when such harm outweighs the interests of the individual.”<sup>42</sup>

“A library’s need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material; it is no less entitled to play that role when it collects material from the internet than when it collects material from any other source.”<sup>43</sup> Thus, internet access in public libraries is not afforded the broadest level of free speech protection, and the government is free to regulate the content of speech and to determine which topics are appropriate for discussion, although to the extent that internet access might be considered a limited public forum, it is treated as a public forum for its topics of discussion.<sup>44</sup> A government-run public forum requires that content-based prohibitions be narrowly drawn to effectuate a compelling state interest.<sup>45</sup>

“The state has a compelling interest in protecting the physical and psychological well-being of children, which extends to shielding minors from material that is not obscene by adult standards, but the means must be carefully tailored to achieve that end so as not to unnecessarily deny adults access to material which is indecent (constitutionally protected), but not obscene (unprotected).”<sup>46</sup>

The Supreme Court has “repeatedly” recognized that the government has an interest in protecting children from harmful materials.<sup>47</sup> As with CIPA, any internet materials that are suitable for adults but

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[t]he most exacting scrutiny test is applied to regulations that suppress, disadvantage, or impose different burdens upon speech on the basis of its content, and to laws that compel speakers to utter or distribute speech bearing a particular message, but regulations that are unrelated to content are subject to an intermediate level of scrutiny reflecting the less substantial risk of excising ideas or viewpoints from public dialogue. . . . Regulations of speech that are regarded as content-neutral receive an intermediate rather than a strict scrutiny under the First Amendment; this includes regulations that restrict the time, place, and manner of expression in order to ameliorate the undesirable secondary effects of sexually explicit expression. Therefore, as a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views expressed are content-based and subject to strict scrutiny under the First Amendment, while laws that confer benefits or impose burdens on speech without reference to ideas or views expressed are in most instances content-neutral. Regulations which permit the government to discriminate on the basis of the content of a speaker’s message ordinarily cannot be tolerated under the First Amendment.

<sup>38</sup> *Simmons v. State*, 886 So. 2d at 403 (internal citations omitted).

<sup>39</sup> Whether or not a place is designated a traditional or designated public form can be significant. The following quotation from 16A Am. Jur. 2d, Constitutional Law, s. 518 is particularly enlightening:

Even protected speech is not equally permissible in all places and at all times; nothing in the Constitution requires the government freely to grant access to all who wish to exercise their right to free speech on every type of government property without regard to the nature of the property or to the disruption that might be caused by a speaker’s activities. The right to communicate is not limitless; even peaceful picketing may be prohibited when it interferes with the operation of vital governmental facilities. Thus, the government’s ownership of property does not automatically open that property to the public for First Amendment purposes. However, the Constitution forbids a state from enforcing certain exclusions from a forum generally open to the public, even if the state is not required to create the forum in the first place.

<sup>40</sup> *Am. Library Ass’n*, 539 U.S. at 205-06.

<sup>41</sup> *B.B. v. State*, 659 So. 2d 256, 259 (Fla. 1995)(citing *In re T.W.*, 551 So.2d 1186 (Fla.1989)).

<sup>42</sup> *Simmons*, 886 So. 2d at 405 (citing *Jones v. State*, 640 So. 2d 1084, 1085-87 (Fla. 1994)).

<sup>43</sup> *Am. Library Ass’n*, 539 U.S. at 208.

<sup>44</sup> See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-46 (1983).

<sup>45</sup> *Id.* at 46.

<sup>46</sup> *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004).

<sup>47</sup> *Id.* (citing *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978); *Morris v. State*, 789 So. 2d 1032, 1036 (Fla. 1st DCA 2001)).

not for children may be accessed by an adult simply by asking a librarian to unblock or disable the filter provided that the adult desires to access the material for "bona fide research or other lawful purposes."<sup>48</sup>

### Access by Adults

The constitutional standards regarding adult access to indecent materials are different from those applicable to minors. It is possible that a court might find that an adult's constitutional right to access such material is hindered by the inherent time delay required to stop the filtering software for the adult patrons benefit. There is no definitive line for determining when an extended delay in granting an adult's request to unblock the software might be considered an unreasonable infringement upon an adult's right to conduct bona fide research and pursue other lawful uses of the internet. For as Justice Kennedy opined in his concurrence in the plurality opinion in *Am. Library Ass'n*:

If, on the request of an adult user, a librarian will unblock filtered material or disable the internet software filter without significant delay, there is little to this case. The Government represents this is indeed the fact.

\*\*\*\*

If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user's election to view constitutionally protected internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge, not the facial challenge made in this case.

\*\*\*\*

There are, of course, substantial Government interests at stake here. The interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as all Members of the Court appear to agree. Given this interest, and the failure to show that the ability of adult library users to have access to the material is burdened in any significant degree, the statute is not unconstitutional on its face.<sup>49</sup>

### B. RULE-MAKING AUTHORITY:

This bill requires the Department of State, Division of Library and Information Services, to adopt rules pursuant to s. 120.536(1), F.S., and s. 120.54, F.S., requiring the head of each administrative unit to annually attest in writing, under penalty of perjury, that all public library locations within the administrative unit are in compliance with s. 257.44(2), which requires each public library to enforce an internet safety policy.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

#### Filtering Difficulties

The following is an enlightening quote from Justice Stevens' dissent in *Am. Library Ass'n*,

Due to the reliance on automated text analysis and the absence of image recognition technology, a Web page with sexually explicit images and no text cannot be harvested using a search engine. This problem is

<sup>48</sup> *Am. Library Ass'n*, 539 U.S. at 209.

<sup>49</sup> *Am. Library Ass'n*, 539 U.S. at 214-15 (Kennedy, J., concurring).

complicated by the fact that Web site publishers may use image files rather than text to represent words, i.e., they may use a file that computers understand to be a picture, like a photograph of a printed word, rather than regular text, making automated review of their textual content impossible. For example, if the Playboy Web site displays its name using a logo rather than regular text, a search engine would not see or recognize this Playboy name in that logo.<sup>50</sup>

#### Harmful to Minors

Section 847.001(6), F.S. provides a definition for "harmful to minors." The instant bill seeks to establish a new definition for "harmful to minors" for the purposes of this bill. It is unclear why a different definition of "harmful to minors" is included in the bill.

#### Visual Depictions

Section 257.44(1)(i), F.S. defines technology protection measure as "software or equivalent technology that blocks or filters internet access to the visual depiction that are proscribed under subsection (2) [the internet safety policy]". This definition would seem not to include audio depictions. The CIPA provides additional protection against other materials that may be prohibited by providing: "(2) Access to other materials[:] Nothing in this subsection shall be construed to prohibit a library from limiting internet access to or otherwise protecting against materials other than those referenced in subclauses (I), (II), and (III) of paragraph (1)(A)(i) [items that are obscene, child pornography, or harmful to minors]" 20 U.S.C. s. 9134.

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

n/a

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<sup>50</sup> *Am. Library Ass'n*, 539 U.S. at 221 (Stevens, J., dissenting).  
STORAGE NAME: h0519.CJ.doc  
DATE: 1/31/2006

1 A bill to be entitled

2 An act relating to Internet screening in public libraries;  
3 creating s. 257.44, F.S.; defining terms; requiring public  
4 libraries to provide technology that protects against  
5 Internet access to specified proscribed visual depictions;  
6 allowing adults to request disablement of the technology  
7 for specified purposes; prohibiting a public library from  
8 maintaining a record of adults who request such  
9 disablement; requiring a public library to post notice of  
10 its Internet safety policy; providing for the assessment  
11 of a fine and attorney's fees and costs in connection with  
12 a violation by a public library; directing the Division of  
13 Library and Information Services within the Department of  
14 State to adopt rules requiring a written attestation of  
15 compliance as a condition of state funding; providing a  
16 cause of action is not authorized for a violation by a  
17 public library except as provided under the act; providing  
18 a finding of important state interest; providing an  
19 effective date.

20  
21 Be It Enacted by the Legislature of the State of Florida:

22  
23 Section 1. Section 257.44, Florida Statutes, is created to  
24 read:

25 257.44 Internet screening in public libraries.--

26 (1) As used in this section, the term:

27 (a) "Administrative unit" means the entity designated by a  
28 local government body as responsible for administering all

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public libraries established or maintained by that local government body.

(b) "Child pornography" has the same meaning as in s. 847.001.

(c) "Harmful to minors" means any picture, image, graphic image file, or other visual depiction that:

1. Taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;

2. Depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals; and

3. Taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

(d) "Minor" means an individual who is younger than 18 years of age.

(e) "Obscene" has the same meaning as in s. 847.001.

(f) "Public computer" means a computer that is made available to the public and that has Internet access.

(g) "Public library" means any library that is open to the public and that is established or maintained by a county, municipality, consolidated city-county government, special district, or special tax district, or any combination thereof. The term does not include a library that is open to the public and that is established or maintained by a community college or state university.

(h) "Reasonable efforts" means the public library, in

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implementing the policy required by subsection (2), in its  
ordinary course of business:

1. Posts its Internet safety policy;

2. Uses a technology protection measure on all public  
computers; and

3. Disables the technology protection measure upon an  
adult's request to use the computer for bona fide research or  
other lawful purpose.

(i) "Technology protection measure" means software or  
equivalent technology that blocks or filters Internet access to  
the visual depictions that are proscribed under subsection (2).

(2)(a) Each public library shall enforce an Internet  
safety policy that provides for:

1. Installation and operation of a technology protection  
measure on all public computers in the public library which  
protects against access through such computers by adults to  
visual depictions that are obscene or constitute child  
pornography and by minors to visual depictions that are obscene,  
constitute child pornography, or are harmful to minors; and

2. Disablement of the technology protection measure by an  
employee of the public library upon an adult's request to use  
the computer for bona fide research or other lawful purpose.

(b) Each public library shall post a notice in a  
conspicuous area of the public library which indicates that an  
Internet safety policy has been adopted and informs the public  
that the Internet safety policy is available for review at each  
public library.

(c) A public library may not maintain a record of names of

adults who request that the technology protection measure be disabled under this subsection.

(3) If a public library knowingly fails to make reasonable efforts to comply with subsection (2), a resident of this state may seek enforcement as provided in this subsection.

(a) Before instituting a civil action under paragraph (b), the resident shall, within 45 days after a public library's alleged failure to make such reasonable efforts, mail a written notice of intended civil action for enforcement to the head of the applicable administrative unit. The notice must identify each public library location involved and specify the facts and circumstances alleged to constitute a violation of subsection (2). Within 45 days after the receipt of such notice, the administrative unit shall mail a written response to the resident who provided the notice. The written response must specify the efforts, if any, which each public library location identified in the notice is making to comply with the requirements of subsection (2). All mailings required by this paragraph must be certified with return receipt requested.

(b) If the resident does not receive the written response required in paragraph (a) within 60 days after receipt of the notice by the head of the administrative unit or if the written response fails to indicate that the public library is making reasonable efforts to comply with subsection (2), the resident may institute a civil action in the circuit court of the county in which the administrative unit is located to seek injunctive relief to enforce compliance with subsection (2).

(c) In connection with an enforcement action under



113 paragraph (b), the court shall:

114 1. Impose a civil fine upon the administrative unit in the  
115 amount of \$100 per day per public library location that is found  
116 to have not made reasonable efforts to comply with subsection  
117 (2). Accrual of the fine shall be for the period between the  
118 date that the head of the administrative unit received the  
119 notice of intended civil action for enforcement and the date  
120 upon which the public library location begins making reasonable  
121 efforts to comply with subsection (2).

122 2. Order an administrative unit that is fined pursuant to  
123 subparagraph 1. to pay reasonable attorney's fees and costs to a  
124 prevailing resident. If the court finds that the civil action  
125 was in bad faith or frivolous, it shall order the resident who  
126 filed the action to pay reasonable attorney's fees and costs to  
127 the administrative unit.

128 (d) The clerk of the circuit court shall act as the  
129 depository for all civil fines paid pursuant to this subsection.  
130 The clerk may retain a service charge of \$1 for each such  
131 payment and shall, on a monthly basis, transfer the moneys  
132 collected for such fines to the Department of Revenue for  
133 deposit in the Records Management Trust Fund within the  
134 Department of State.

135 (4) The Division of Library and Information Services  
136 within the Department of State shall adopt rules pursuant to ss.  
137 120.536(1) and 120.54 which require the head of each  
138 administrative unit to annually attest in writing, under penalty  
139 of perjury, that all public library locations for which the  
140 administrative unit is responsible are in compliance with

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141 subsection (2) as a condition of the receipt of any state funds  
142 distributed under this chapter.

143 (5) Except as authorized in subsection (3), this section  
144 does not authorize a cause of action in favor of any person due  
145 to a public library's failure to comply with subsection (2).

146 Section 2. In accordance with s. 18, Art. VII of the State  
147 Constitution, the Legislature finds that the installation and  
148 operation by public libraries of technology protection measures  
149 that protect against access by adults to visual depictions that  
150 are obscene or constitute child pornography and by minors to  
151 visual depictions that are obscene, constitute child  
152 pornography, or are harmful to minors fulfills an important  
153 state interest.

154 Section 3. This act shall take effect October 1, 2006.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1 (for drafter's use only)

Bill No. **HB 519**

COUNCIL/COMMITTEE ACTION

ADOPTED \_\_\_\_\_ (Y/N)  
ADOPTED AS AMENDED \_\_\_\_\_ (Y/N)  
ADOPTED W/O OBJECTION \_\_\_\_\_ (Y/N)  
FAILED TO ADOPT \_\_\_\_\_ (Y/N)  
WITHDRAWN \_\_\_\_\_ (Y/N)  
OTHER \_\_\_\_\_

1

Council/Committee hearing bill: Civil Justice Committee  
Representative Kravitz offered the following:

**Amendment (with title amendments)**

Remove line(s) 87-143, and insert:

(3) The Division of Library and Information Services  
within the Department of State shall adopt rules pursuant to ss.  
120.536(1) and 120.54 which require the head of each  
administrative unit to annually attest in writing, under penalty  
of perjury, that all public library locations for which the  
administrative unit is responsible are in compliance with  
subsection (2) as a condition of the receipt of any state funds  
distributed under this chapter.

(4) This section

===== T I T L E A M E N D M E N T =====

Remove line(s) 10-17 and insert:

its Internet safety policy; directing the Division of Library  
and Information Services within the Department of State to adopt  
rules requiring a written attestation of compliance as a  
condition of state funding; providing a cause of action is not  
authorized for a violation by a public library; providing